TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 358.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

TITLE INSURANCE & TRUST COMPANY, SECURITY TRUST & SAVINGS BANK, HARRY CHANDLER, ET AL., ETC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JUNE 6, 1923.

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1 *Names and addresses of attorneys.*

For plaintiff and appellant: Joseph C. Burke, Esq., United States district attorney, and George A. H. Fraser, Esq., special assistant to the Attorney General, Federal Building, Los Angeles, Calif.

For defendants and appellees: O'Melveny, Millikin & Tuller, Title Insurance Building, Los Angeles, Calif.

3 [Citation and service omitted in printing.]

4 United States of America, Southern District of California, Northern Division, in the District Court, SS. No. B–68, in Equity.

[Title omitted.]

Bill of complaint.

Filed Dec. 20, 1920.

Comes now the plaintiff above named, by its attorneys, and complaining of defendants alleges and says:

I.

This suit is brought under the authority and by the direction of the Attorney General of the United States at the request of the Secretary of the Interior, and is brought by plaintiff in furtherance of its Indian policy and also in its capacity, and to discharge its obligations, as guardian for sundry Indians known as the Tejon Band or Tribe of Indians now and from time immemorial residing on
5 certain premises hereinafter described, in what is now Kern County, California; that said Indians are and from time immemorial have been tribal Indians, and at all times since July 7, 1846, have been and now are wards of the United States and at all times herein mentioned were and still are incompetent to manage their own affairs; that at all of said times they were and still are what are commonly called Mission Indians.

II.

That defendant Title Insurance & Trust Company is a corporation organized and existing under and by virtue of the laws of the State of California, and that its principal office and principal place of business are in the city of Los Angeles, in said State;

That defendant Security Trust and Savings Bank is a corporation organized and existing under and by virtue of the laws of the

State of California, and that its principal office and principal place of business are in the city of Los Angeles, in said State;

That defendants Harry Chandler, O. P. Brant, M. H. Sherman, and E. P. Clark are citizens and residents of the State of California, and of the southern judicial district thereof.

III.

That the jurisdiction of the court in this suit depends upon the fact that the United States of America is plaintiff herein.

IV.

That defendant Title Insurance and Trust Company is and
6 ever since September 19, 1916, has been the owner in fee and, except as hereinafter set forth, is and ever since said date has been by itself or through the other defendants above named, in possession and control of the following described premises situate in Kern County, California, to wit: Starting from corner No. 8 of El Tejon ranch, as found and established in the resurvey thereof of October, 1880, on file in the office of the United States surveyor general, San Francisco, California, south 84° 21′ east 340.10 chains (22,448 ft.) to corner No. 9; thence north 22° 45′ east 53.52 chains (3,532 ft.) to corner No. 10; thence north 56° 0′ west 229.98 chains (15,180 ft.) to corner No. 11; thence north 43° 15′ west 93.27 chains (6,153 ft.) to the intersection of the ranch line of said ranch with the township line between township 11 north and township 12 north, range 17 west, San Bernardino base and meridian; thence south 26° 0′ west 237 chains (15,632 ft.) to point of beginning, situate in sections 18 and 19, township 11 north, range 16 west, and sections 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 24, township 11 north range 17 west, San Bernardino base and meridian, containing 5,364 acres more or less, together with full rights in and to the waters of Tejon Creek and Cedar Creek which flow through said premises and the right to use on and in connection with said premises for irrigation of the irrigable lands thereof and for watering stock and for domestic purposes at all times throughout the year seven
7 cubic feet of water per second of time with a priority of immemorial antiquity, the same being the first right and priority in said streams and each of them; that said premises form part of what is known as Rancho El Tejon.

That defendant Security Trust & Savings Bank is trustee under and by virtue of a certain deed of trust made and executed as of May 1, 1916, wherein and whereby El Tejon Ranchos, Inc., a corporation, then owner in fee of the premises last above described and other property, conveyed to said Security Trust & Savings Bank said premises and other property in trust to secure the payment of 1,000 notes of $1,000 each, dated May 1, 1916, and due May

1, 1926, made and executed or to be made and executed by said El Tejon Ranchos, Inc., or any of such notes at any time issued, all on sundry terms and conditions and under divers uses and trusts as in said deed of trust set forth, which said deed of trust is recorded in book 315, page 132, of the records of Kern County, and in book 6304, page 262, of the records of Los Angeles County, California, and is still outstanding and unreleased.

Plaintiff is informed and believes, and on such information and belief avers, that defendants Harry Chandler, O. P. Brant, M. H. Sherman, and E. P. Clark, and each of them, claim some right, title, interest, or estate in and to the premises in this paragraph specifically described, but the precise nature and extent of such claim, right, title, interest, or estate is to plaintiff unknown;
8 nor has plaintiff, by the exercise of diligence, been able to ascertain the same, except that plaintiff on information and belief avers that said last named defendants are and for a long time past have been in possession and control of said premises, either by and through themselves and their agents or conjointly with defendant Title Insurance & Trust Company, and either under some individual claim of right or under some right or claim of right derived from defendant Title Insurance & Trust Company, the owner of the fee title, but the facts in this regard are to plaintiff unknown, nor has plaintiff by the exercise of diligence been able to discover them. But plaintiff avers that each and every right, title, interest, claim, or demand of any or all of the defendants herein, in or to said premises in this paragraph described, is subject to a right of occupancy, use, and possession of the whole of said premises, including water rights as above described, vested in said band or tribe of Tejon Indians, and to actual possession by said band or tribe of a portion of said premises and water rights as hereinafter more particularly set forth.

V.

That in and prior to the year 1843 said premises above described were within and subject to the sovereignty and jurisdiction of the Republic of Mexico and were part of the ungranted lands of that Republic; that, however, from time immemorial prior to said year and during the entire period of Spanish and Mexican sov-
9 ereignty over the territory now embraced within the State of California, said premises, and as well a much larger tract of which said premises were and are a part, were inhabited by the tribe known to the Spaniards and Mexicans as Tejon Indians; that said Tejon Indians were and are the ancestors and predecessors of the existing band or tribe of that name; that up to the years 1843 and 1845, and for a long time thereafter, as hereinafter set forth, said Tejon Indians resided upon and exclusively possessed, used, and cultivated said premises above described, and as well said larger tract, raising crops and pasturing cattle, horses, and other stock thereon, gathering the natural products of the soil thereof and residing thereon in permanent dwellings; that said Tejon Indians

at all times herein mentioned were and now are agricultural, pastoral, sedentary, and peaceful Indians; that up to said years 1843 and 1945 not only was said use and possession of said Indians exclusive, peaceful, open, notorious, adverse, and undisturbed, but no claim, title, or right to said premises or said larger tract, or any portion of either, was made or asserted by any other person or persons whomsoever except the general sovereignty claimed by the Kingdom of Spain or the Republic of Mexico over the same.

That from the time of the establishment of the Catholic missions in what is now the State of California, said Tejon Indians were and still are under the spiritual jurisdiction of the Catholic
10 Church; that they were instructed in Christianity and in the arts of civilization by the mission fathers; and that a church was built for them on said premises, in which services were and still are from time to time held.

That under and by virtue of the laws both of Spain and of Mexico said Tejon Indians were entitled to the continuous and undisturbed occupancy, possession and use of said premises, as well as of the larger tract then occupied by them, as being land needed by them for habitation, tillage and pasture, and as including trees and bushes for natural food products, wood for fuel and said water right for irrigation and domestic purposes; and that the use, occupancy and possession of the Tejon Indians as above set forth was had and exercised by them and they were protected in the same under and by virtue of said laws of Spain and Mexico, which said laws governed and remained in force over all the land herein described or referred to up to the time of the acquisition by the United States from Mexico of the territory now included within the State of California.

VI.

That on or about May 30, 1843, Jose Antonio Aguirre and Ignacio del Valle, both Mexican citizens, petitioned the Mexican Governor of California for a grant from the Government of Mexico in accord with the laws of said Republic, of a tract of land known as Tejon; and thereafter such proceedings were had that on
11 or about November 24, 1843, said governor made and executed a grant of land to said petitioners, including the premises above described and other territory, aggregating about 98,000 acres. That said grant was made upon and subject to the following condition, among others, to wit: "2d. No impediran el cultivo y demas beneficios que han disfrutado semipre los indios que se hallan establecidos en dho parage," which being interpreted, is:

"They must not prevent (interfere with) the cultivation and other advantages which the Indians who are found established in said place have always enjoyed."

which said grant, embodying said condition, was approved by the departmental assembly and delivered to said grantees on or about June 30, 1845; that said grant included the premises above described along with other territory.

VII.

That thereafter and on or about July 7, 1846, the United States succeeded the Republic of Mexico in the sovereignty of and over the territory now included in the State of California including the tract embraced in said grant; that thereafter and within the time provided by law, said grantees presented said claim for confirmation to the Board of Commissioners appointed under the act of Congress of March 3, 1851 (9 Stat. L. 631), to ascertain and settle private land claims in California, and that thereafter such proceedings were had before and by said board that on or about May 8, 1855, said
12 grant was by said board confirmed; that in its opinion confirming said grant, said board used the following language: "It is proper to remark in reference to this grant that it contains a reservation of such lands as may be necessary for a military establishment * * *. There is also a provision requiring the grantees not to 'prevent the cultivation and other benefits that the Indians may have established in said place.' This restriction we have heretofore decided does not affect the right of property, though it may create a use in favor of the Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal."

That an appeal was taken from the decree or decision of said board confirming said grant to the District Court of the United States for the Southern District of California, which said court on, to wit, March 18, 1858, affirmed said decree or decision; that a further appeal was taken from said last-named decision to the Supreme Court of the United States, which said court on the first Monday of December, 1859, dismissed said appeal, whereby the decree or decision affirming said grant became final.

VIII.

That thereafter such proceedings were had that on, to wit, May 9, 1863, a United States land patent was issued in due form, conveying to said Aguirre and del Valle a tract of land in said
13 patent described embracing the premises hereinbefore described and other territory, which said patent in the granting clause thereof contained the following language: "But with the stipulation that in virtue of the 15th section of the said act (March 3, 1851) the confirmation of this claim and this patent 'shall not affect the interests of third persons.'"

That thereafter by divers mesne conveyances the fee title to said land passed from said grantees to Title Insurance and Trust Company, defendant herein, which became the owner of said title thereto on or about September 9, 1916, and still owns and holds the same; that the right, title, interest, claim and demand of each of defendants herein, in and to said premises, is, so far as known to plaintiff, hereinabove and in Paragraph IV of this complaint set forth; that the same is subject, however, to the right of occupancy, possession

and use of said premises by the Tejon Indians as hereinabove and hereinafter set forth, and except as to the actual occupancy, possession and use of said Indians of portions of said premises as hereinafter shown.

IX.

That under and by virtue of the laws, usages and customs of Spain and Mexico, the terms of the Mexican grant aforesaid and of its confirmation, the patent aforesaid, the treaty of Guadalupe Hidalgo, whereby the United States acquired from Mexico the
14 territory now comprising the State of California, the laws of the United States and the law of nations, said tribe or band of Tejon Indians became, were and are entitled to the full, undisturbed, and continuous occupancy, possession and use of the premises hereinabove described as hereinbefore more fully set forth, unless and until the said Indian title should be extinguished by this plaintiff; that this plaintiff has never extinguished, modified or diminished said title; that said Indians maintained and enjoyed their said right of possession and use of said premises as a tribe openly, notoriously, continuously, peaceably, exclusively and without molestation for a long time after said grant of 1843, confirmed in 1845, as aforesaid, but that beginning about the year 1888, or earlier, the exact date on account of the remoteness of the facts described and the lack of authentic records being unknown to this plaintiff, the grantees of said Aguirre and del Valle, being the predecessors in title and interest of defendants herein, commenced gradually to drive and exclude said band or tribe from the outer limits of the premises above described by unlawfully and forcibly prohibiting and preventing said Indians from using the same for pasture or residence, and by themselves using the same at their discretion for cattle range or agriculture, by discouraging the residence of said Indians thereon, and by pulling down or otherwise destroying the houses of said Indians thereon and destroying their crops and other improvements, and in these and other ways gradually drove and forced back said Indians and
15 narrowed and restricted the limits of the land actually occupied by them; that defendants when they acquired fee title to or took possession of said premises as aforesaid, in disregard and violation of said Indian right of occupancy, possession and use, forcibly and unlawfully retained possession of and appropriated and devoted to their own use all portions of the above described premises from which said Indians had been driven, as aforesaid, and ever since have used and enjoyed and still use and enjoy the same, and continue to exclude and threaten to perpetually exclude said Indians therefrom; that defendants from the time when they acquired fee title to and general possession of said premises continued for their own benefit and advantage further to extend the policy of repression and exclusion, and with full notice and knowledge of said Indian title, and forcibly and unlawfully and in disregard and defiance of the said title have, by themselves and their agents, still further

driven out and driven back said Indians and have restricted their use and occupancy of said premises and made it impossible for said Indians to occupy, possess or use the greater portion of said premises at all, or any portion thereof peaceably and securely, and still continue and threaten to continue said acts and policy until said Indians are entirely driven and expelled from every portion of said premises; that these defendants in pursuance of said course have refused and still refuse to permit said Indians, or any of them
16 to acquire or own so much as a single head of cattle to furnish milk for their children; that they have refused and still refuse to permit them, or any of them, to own horses except in so far as the same are useful on the said ranch on which some of the Indians are employed as laborers; that they have interfered with the proper and beneficial use for irrigation, by said Indians, of the waters of the creeks flowing through said premises; that they have refused and still refuse to allow said Indians to improve or repair their huts even when said Indians had obtained and had upon the premises materials for that purpose; that they have entered upon, fenced in and used, and still use for their own purposes, land once cultivated by the Indians and needed by them for their subsistence; that when members of said band died or were driven out by defendants, by the measures above described, or otherwise, defendants have immediately pulled down their houses, destroyed their improvements and turned their gardens and cultivated grounds into cattle range and threaten to continue so to do; that they have by duress and threats of eviction forced many of said Indians employed upon said ranch to submit to a deduction from their wages of a sum alleged to represent rental for the premises occupied by them, and have brought suits in ejectment against such Indians as refused to submit to such deduction or to pay said alleged rental; that the aforesaid matters and things have been done forcibly, unlawfully and by vis major, and that by these
17 and other acts of wrong and oppression the Indians have been gradually driven off said ranch so that the numbers of those occupying the premises hereinabove described, or any portion thereof, have been reduced from about 300 to about 80, and so that the acreage actually occupied by them has been reduced from about 5,364 acres to about 65 acres, which said 65 acres are still possessed, occupied, irrigated and cultivated by the remnants of said band; that unless restrained by this court, defendants threaten to continue and will continue the policy and acts above described until all of said Indians are driven off said ranch and their occupancy, possession and use of said premises totally destroyed.

X.

That said Indian right of occupancy, use and possession of said premises above described includes the right to use the wagon roads over said ranch leading from the county roads to said premises and the use under a first right and priority in Tejon Creek and Cedar Creek of an adequate supply of water for irrigating such portions of

the lands thereof as are irrigable; that from 600 to 900 acres of said premises were cultivated by said Indians as early as 1843 and continuously since, except as and until said area was restricted by the wrongful acts of defendants and their predecessors as above set forth; that of said premises from 300 to 350 acres are and always have been irrigable from the waters of Tejon Creek and Cedar
18 Creek flowing through said premises and to which said premises are riparian; and that an additional acreage is irrigable for early crops from the waters of said creeks; that said irrigable area was in the year 1843, and continuously since that time has been, irrigated by said Tejon Indians except as and when restricted by defendants and their predecessors, as above set forth, and that portions thereof are still irrigated by said Indians to the fullest extent to which defendants permit them to use of said water for such purpose; that of the flow of said two creeks seven cubic feet of water per second of time and water from other sources in addition is necessary for the ordinary irrigation of said irrigable area of from 300 to 350 acres.

That there is hereto attached, marked "Exhibit A" and made a part of this complaint, a colored map showing the premises above described, the land now cultivated by said Indians, the land formerly irrigated by them, the arable land within said premises, and the former and present irrigation ditches, with other details.

XI.

That in and by the act of Congress of January 12, 1891 (26 Stat. L. 712), it was made and is the duty of the Attorney General at the request of the Secretary of the Interior, whenever the lands occupied by any band or village of Mission Indians are within the limits of a confirmed private grant, to defend the Indians in the rights secured to them in the original grant from the Mexican Govern-
19 ment and by the act of the State of California of April 22, 1850; that the Secretary of the Interior, through the Commissioner of Indian Affairs, has requested the Attorney General to institute this suit; that the rights of the Tejon Indians under the Mexican grant here involved are as hereinabove set forth; that said California Act of 1850 provides in effect, among other things, that persons and proprietors of land on which Indians are residing shall permit such Indians peaceably there to reside in pursuit of their usual avocations for the maintenance of themselves and their families; with further provisions whereby such proprietor may, by proceedings in court, obtain the separation of sufficient land for the necessary wants of said Indians, including the site of their village or residence, if they so prefer it, specifically requiring that no such selection shall be made to the prejudice of such Indians and that they shall not be forced to abandon their home or village where they have long resided.

XII.

That by reason of the appropriation and use by defendants of portions of said premises from which said Indians were excluded by defendants' predecessors in title, and the continued exclusion of said Indians therefrom by defendants as above set forth, said Indians have been damaged in the sum of $75,000.

That by reason of the further expulsion and exclusion of said Indians by defendants from other portions of said premises, and the continued appropriation and use thereafter by defendants of such other portions as above set forth, said Indians have been damaged in the further sum of $2,500.

That by reason of the molestation of said Indians by defendants and the restrictions and limitations placed by defendants on said Indians in the use and enjoyment of those portions of said premises still occupied by them as above set forth, said Indians have been damaged in the further sum of $50,000.

Wherefore, plaintiff prays

1. That defendants be required to make full disclosure and discovery of the matters aforesaid, and especially as to nature of the right, title, interest, estate, claim or demand of defendants Harry Chandler, O. P. Brant, M. H. Sherman, and E. P. Clark in or to said premises or to the possession or control thereof, or any part thereof, according to the best of their knowledge and information, and full, true, direct and perfect answers make to the matters hereinbefore charged.

2. That the Indian title of occupancy, possession and use of and to the premises hereinabove described, including said described water rights, and said rights of way, and every part and portion thereof, be quieted in said Indians as against the fee title, and any and every title, possessory or otherwise, of defendants herein, and each and all of them; and decreed to be superior to and free from the lien of the deed of trust hereinbefore referred to; and that said Tejon Indians, including all living members of said band heretofore driven or forced from said premises by defendants or their predecessors, and the descendants of any and all of said Indians be held, adjudged and decreed to have full and perpetual right and title to occupy, possess, use and enjoy said premises and all thereof, including the rights in the waters of said Tejon and Cedar Creeks as above described, and all other waters to which said premises are riparian, and including all the natural products of said premises, whether by agriculture, horticulture, irrigation, cattle raising, or any other ordinary method of use, without interference, restriction or molestation of any sort, nature or description, by or from defendants herein or any of them, or any person or persons claiming under or through them or any of them, as long as any of said Indians or any of their children or descendants continue to occupy or dwell upon said premises; but without any right to sell, dispose of or encumber said title to said

premises, or any part thereof, except to or in favor of or with the consent of the United States.

3. That in and by the final decree herein, defendants and each and all of them and all their heirs, executors, administrators, agents, representatives, successors and assigns, and any and all persons claiming under or through them, or any of them, be perpetually enjoined from interfering with said Indian use, occupation, or possession of said premises or any part thereof, in any manner or by any means, direct or indirect, or from harassing, molesting, or
22 restricting said Indians in any manner, or by any means, direct or indirect, in the full exercise and enjoyment by them of said Indian title; and that in the meantime a preliminary injunction be issued preserving the status quo and enjoining and prohibiting any acts or interference with or molestation of said Indians, or any restriction or limitation of the use and occupancy now enjoyed by them, or the bringing of further prosecution of any suits or actions against them arising out of such use or occupancy, by defendants or their representatives or anyone claiming by or through them or any of them, until final decree.

4. That judgment be entered against defendants and in favor of plaintiff for the use and benefit of all of said Tejon Indians in the sum of $127,500 as compensatory damages for the wrongful and illegal appropriation and use by defendants of portions of said premises from which said Indians had been excluded by defendants' predecessors in title, and for the continued exclusion of said Indians from said portions by defendants; and for the wrongful and illegal exclusion of said Indians from other portions of said premises by defendants and the continued use of said other portions by defendants as above set forth; and for the restriction by defendants of the use, possession, and enjoyment by said Indians of the portion of said premises still actually held by them as aforesaid.

5. That plaintiff may have such other and further relief as
23 to the court may seem proper and that defendants be decreed to pay all the costs of this proceeding.

ROBERT O'CONNOR,
United States Attorney.

Address:
Federal Bldg., Los Angeles, Cal.

JOHN F. TRUESDELL,

230 Post Office Bldg., Denver, Colo.

GEORGE A. H. FRASER,

" " " " "

Special Assistants to the Attorney General,
Attorneys for Plaintiff.

(map.)

[File endorsement omitted.]

24 [File endorsement omitted.]

United States of America, District Court of the United States, Southern District of California, Northern Division.

In Equity.

Subpoena and marshal's return.

Filed Feb. 7, 1921.

The President of the United States of America, Greeting, to Title Insurance and Trust Company, a corporation, Security Trust and Savings Bank, a corporation, Harry Chandler, O. P. Brant, M. H. Sherman, and E. P. Clark:

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the court room in Fresno, California, on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a bill of complaint exhibited against you in said court by The United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

(Seal.) Witness, the Honorable Oscar A. Trippet, judge of the District Court of the United States, this 20th day of Decem-
25 ber in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

CHAS. N. WILLIAMS,
Clerk.

By R. S. ZIMMERMAN,
Deputy Clerk.

Memorandum pursuant to rule 12, of Rules of Practice for the courts of equity of the United States promulgated by the Supreme Court, November 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the clerk's office; which (except when court is in session and a judge present at Fresno), is at Los Angeles, otherwise the bill may be taken pro confesso.

CHAS. N. WILLIAMS,
Clerk.

By R. S. ZIMMERMAN,
Deputy Clerk.

To the marshal of the United States for the Southern District of California:

Pursuant to rule 12, the within subpoena is returnable into the clerk's office twenty days from the issuing thereof.

Subpoena issued December 20th, 1920.

CHAS. N. WILLIAMS,
Clerk.

By R. S. ZIMMERMAN,
Deputy Clerk.

SOU DISTRICT OF CAL., *ss:*

I hereby certify and return, that on the 21st day of Dec.,
26 1920, I received the within subpoena and that after diligent search, I am unable to find the within named defendants M. H. Sherman within my district.

C. T. WALTON,
United States Marshal.
By D. S. BASSETT,
Deputy United States Marshal.

UNITED STATES MARSHAL'S OFFICE,
Southern District of California, ss:

I hereby certify, that I received the within writ on the 21st day of December, 1920, and personally served the same with bill of complaint on the 22nd day of December, 1920, on Title Insurance & Trust Co., Security-Trust & Savings Bank, Harry Chandler, O. F. Brant, & E. P. Clark by delivering to and leaving with W. B. Brown, Asst. Sec. J. F. Sattori, Pres. Harry Chandler, O. F. Brant, and E. P. Clark, said defendants named therein, personally, at the county of Los Angeles in said district, a copy thereof.

[SEAL.]

C. T. WALTON,
U. S. Marshal.
By D. S. BASSETT,
Deputy.

Dec. 22nd, 1920.

[File endorsement omitted.]

27 [File endorsement omitted.]

In the United States District Court, South rn District of California, Northern Division.

[Title omitted.]

Motion to dismiss.

Filed Jan. 7, 1921.

Come now Title Insurance and Trust Company, a corporation, Security Trust and Savings Bank, a corporation, Harry Chandler, O. P. Brant, M. H. Sherman, and E. P. Clark, defendants herein, and jointly and severally move the court to dismiss the bill of complaint herein on the ground that the same does not state any matter of equity entitling plaintiff to relief prayed for, nor to any relief, nor are the facts stated sufficient to entitle plaintiff to any relief against these defendants, or any of them.

Wherefore, these defendants pray for judgment of this court whether they, or any of them, shall be required to further
28 answer and further pray that said bill of complaint be dismissed with costs of these defendants.

C. H. BROCK,
J. N. HASTINGS,
O'MELVENY MILLIKIN & TULLER,
WALTER K. TULLER,
Solicitors for defendants.

[Jurat showing the above was duly sworn to by W. K. Tuller. Omitted in printing.]

[File endorsement omitted.]

[Title omitted.]

29 [Title omitted.]

Order filing decree.

This cause coming on at this time ex parte; Robert B. Camarillo, Esq., appearing on behalf of the Government and ————, Esq., appearing on behalf of the defendants, and a final decree of dismissal having been presented to the court at this time and now, pursuant to a motion made by defendant's attorney as aforesaid, it is by the court ordered that said decree be signed, filed and entered, said plaintiff's attorney having excepted to the order granting motion to dismiss and to signing of decree. Said decree is as follows, to wit:

30 In the United States District Court, Southern District of California, Northern Division.

[Title omitted.]

Decree dismissing bill of complaint.

Filed Oct. 6, 1921.

This cause came on to be heard at this term on defendants' motion to dismiss the bill of complaint herein, and was argued by counsel. Thereupon, upon consideration thereof, it was ardered, adjudged and decreed, and it is now hereby ordered, adjudged, and decreed that said motion to dismiss be and the same is hereby granted, and that said bill of complaint be and the same is hereby dismissed and that plaintiff take nothing by this action and that defendants go hence without day.

The plaintiff elects to stand upon its bill of complaint and to said order and to this decree plaintiff takes exception and said exception is hereby allowed.

Dated at Los Angeles, California, the 6th day of October, 1921.

TRIPPET, *Judge.*

31 Approved as to form as provided in rule 45 (approved as to form, Robert B. Camarillo, Asst. U. S. attorney). Decree entered and recorded, Oct. 6, 1921.

CHAS. N. WILLIAMS, *Clerk.*
LOUIS J. SOMERS, *Deputy.*

[File endorsement omitted.]

Whereupon, said bill of complaint, subpœna ad res. motion to dismiss, and decree of dismissal are hereto annexed; the said motion to dismiss being duly signed, filed, and enrolled pursuant to the practice of said District Court.

Attest my hand and the seal of said District Court, this 22 day of October, A. D. 1921.

[SEAL.]

CHAS. N. WILLIAMS,
Clerk.

By LOUIS J. SOMERS,
Deputy Clerk.

32 United States of America, Southern District of California, Northern Division, in the District Court, ss. No. B-68, in equity.

[Title omitted.]

Petition for appeal.

Filed Mar. 10, 1922.

The above-named plaintiff, conceiving itself aggrieved by the judgment and decree of dismissal made and entered on the 6th day of October, 1921, in the above-entitled cause, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree were made and entered, duly authenticated, may be sent to and filed with
33 said the United States Circuit Court of Appeals for the Ninth Circuit, and that a citation be issued as provided by law.

JOSEPH C. BURKE,
United States Attorney,
GEORGE A. H. FRASER,
Special Assistant to the Attorney General,
Attorneys for Plaintiff

[File endorsement omitted.]

34 United States of America, Southern District of California, Northern Division, in the District Court, ss. No. B–68, in equity.

[Title omitted.]

Assignment of errors.

Filed Mar. 10, 1922.

Comes now the plaintiff above named and respectfully represents that in the record, proceedings, and decree in the above-entitled cause there is manifest error, in this, to wit:

1. That the court erred in sustaining defendants' motion to dismiss the bill of complaint herein.

2. That the court erred in making and entering the final decree herein after plaintiff had elected to stand on its complaint.

3. That the court erred in dismissing the bill of complaint in said cause, in and by said final decree.

4. That said final decree is contrary to law and equity in this, to wit: That the motion to dismiss said bill of complaint should have been overruled and defendants required to answer said bill of complaint.

35 5. That the court erred in refusing and denying the injunction prayed in said bill of complaint.

6. That the court erred in holding, in and by said final decree, that said bill of complaint does not state any matter of equity entitling plaintiff to the relief prayed for or any relief, and in holding therein and thereby that the facts stated in said bill are not sufficient to entitle plaintiff to the relief prayed for or to any relief against defendants or any of them.

7. That the court erred in holding in and by said final decree that the Tejon Indians mentioned in said complaint abandoned and lost all and singular the claims, rights, titles and interests of occupancy and possession described in said complaint by failure to present the same to the commission appointed under and by virtue of the act of Congress of March 3, 1851 (9 Stat. L. 631), to adjust land claims in California.

8. That the court erred in holding in and by said decree that the patent issued by the United States to defendants mentioned in said complaint and covering the lands in said complaint described is conclusive of the title of defendants, and that under and by virtue of said patent said title is free from, clear of and not subject to any claim, right, title, and interest of the Tejon Indians set forth in said bill of complaint.

9. That the court erred in holding in and by said decree that said Tejon Indians are not and were not "third parties" whose rights under said act of March 3, 1851, remained and remain unaffected by the issuance of said United States patent to defendants.

36 10. That the court erred in holding in and by said decree that defendants' title was not and is not now charged with and subject to the Indian right, title and interest of occupancy, use and possession described in the complaint.

11. That the court erred in holding in and by said decree that said act of March 3, 1851, required said Tejon Indians to appear before the Board of Commissioners created by said act, there to set up and maintain said title of occupancy and possession, or for any purpose, or at all.

12. That the court erred in holding in and by said decree that under said act of March 3, 1851, said Tejon Indians and all other Indians similarly situated were not to be regarded as on a different footing and in a different class from those persons who were required to present their claims or titles before said board.

13. That the court erred in holding in and by said decree that land charged with and subject to said Indian title is not and cannot properly be known as "public domain."

14. That the court erred in holding in and by said decree that land charged with and subject to said Indian title is not and can not properly be known or described as "public land of the United States."

15. That the court erred in holding in and by said decree that the act of the State of California of April 22, 1850, later adopted by Congress as a safeguard for said Tejon Indians and other

37 Indians by the act of January 12, 1891 (26 Stat. L. p. 712, section 6), did not and does not protect said Tejon Indians, and did not and does not affect the property described in the complaint with an easement or a trust in favor of said Indians prior and superior to any title or titles of defendants and constituting a right of use, occupancy and possession superior to any title or titles of defendants.

16. That the court erred in holding in and by said decree that the object of said act of 1851 was not fully served when the Mexican grantees presented their title for confirmation, without presentation by said Indians of their said title.

17. That the court erred in holding in and by said decree that said Tejon Indians, being wards of the United States and non sui juris were charged with knowledge of said act of March 3, 1851, or any of its provisions or requirements, and that it was the intention of Congress to make said act applicable to such Indians or bind them by any of its provisions.

18. That the court erred in holding in and by said decree that the case at bar is governed by the decision in Barker v. Harvey, 181 U. S. 481; 126 Calif. 262, and that it is not distinguishable

in fact therefrom, especially in that in Barker v. Harvey it was found as a fact that prior to the Mexican grant the Indians there concerned had abandoned their occupancy and that the grant as finally allowed contained no provision for their protection,
38 whereas, in the case at bar the land in controversy has been continuously occupied and is still occupied by the Tejon Indians, except as to parts thereof from which they have been wrongfully and forcibly expelled by defendants, and the Mexican grant as finally confirmed contains a specific provision for the protection of said Tejon Indians.

19. That the court erred in holding in and by said decree that the provision in the Mexican grant described in the complaint forbidding interference with the cultivation and improvements of the Tejon Indians is no longer in force, and that the same was superseded or extinguished by the issuance of defendants of the United States patent described in the complaint, or in any other way, or at all.

20. That the court erred in holding in and by said decree that said United States patent changed or enlarged the rights of the grantees therein by relieving or discharging said rights of or from the easement, trust or use of occupancy and possession by the Tejon Indians of a portion of the land conveyed by said patent and described in the complaint.

Wherefore, plaintiff prays that the errors herein be corrected and its appeal sustained; that said judgment and decree be reversed; that the bill of complaint herein be sustained as against defendants' motion to dismiss, and that defendants be required to answer said bill.

JOSEPH C. BURKE,
United States Attorney.
GEORGE A. H. FRASER,
Special Assistant to the Attorney General,
Attorneys for Plaintiff.

39 [File endorsement omitted.]

United States of America, Southern District of California, Northern Division, in the District Court, ss. No. B-68, in Equity.

[Title omitted.]

Ordered allowing appeal.

Filed Mar. 10, 1922.

40 This cause coming on this day to be heard upon the petition of plaintiff for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered herein on, to wit, the 6th day of

October, 1921, as in said petition more fully set forth, and the court, being now fully advised in the premises, it is hereby

Ordered, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said final decree is hereby allowed.

Given at Los Angeles, California, this 10th day of March, 1922.

By the court.

TRIPPET,
District Judge.

Approved as to form but reserving all rights.

O'MELVENY, MILLIKIN AND TULLER,
Attorneys for Defendants.

[File endorsement omitted.]

41 United States of America, District Court of the United States, Southern District of California, Northern Division.

Præcipe for transcript of record.

Filed Mar. 11, 1922.

To the clerk of said court:

SIR: Please issue transcript of record on appeal in the above entitled case, consisting of:

Complaint.
Summons with return of service.
Motion to dismiss.
Order sustaining the motion to dismiss.
Plaintiff's election to stand on complaint.
Judgment of dismissal.
Plaintiff's exceptions to order sustaining motion to dismiss and to judgment.
Statement that no opinion was rendered by the court.
Certificate of clerk to judgment roll.
Petition for appeal.
42 Assignment of errors.
Order allowing appeal.
Præcipe for tanscript of record.
Proof of service of same on defendants.
Citation and return of service thereon.
Clerk's certificate to transcript of record.

JOSEPH C. BURKE,
United States District Attorney.
GEORGE A. H. FRASER,
Special Assistant to the Attorney General,
Attorneys for Plaintiff.

[File endorsement omitted.]

43 In the District Court of the United States, Southern District of California, Southern Division.

Clerk's certificate.

I, Chas. N. Williams, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44, inclusive, to be the transcript of record on appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true, and correct copy of the citation, complaint, summons with return of service, motion to dismiss, decree of dismissal, certificate of clerk to judgment roll, petition for appeal, assignment of errors, order allowing appeal, præcipe for transcript and proof of service, and I do further certify that no opinion was rendered by the court.

44 In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of March, in the year of our Lord one thousand nine hundred and twenty-two, and of our Independence the one hundred and forty-sixth.

CHAS. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
[SEAL] By R. S. ZIMMERMAN,
Deputy.

Receipt of a copy of the within, and receipt of 3 copies hereof, is hereby admitted this 1 day of April, A. D. 1922.

O'MELVENY, MILLIKIN & TULLER,
Attorneys for Appellees.

[File endorsement omitted.]

44-a United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

45 [Title omitted.]

Order of submission.

Ordered appeal in the above entitled cause argued by Mr. George A. H. Fraser, special assistant to the Attorney General and counsel for the appellant, and by Mr. Walter K. Tuller, counsel for the appellee, and submitted to the court for consideration and decision.

46 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Suggestion of death of an appellee and motion for substitution.

Filed May 1, 1922.

47 Comes now appellant above named by its attorneys and respectfully represents:

I.

That by inadvertence and mistake one of the parties defendant in the case in the District Court from which this appeal is taken, being also one of the appellees in this appeal, was and is named in the pleadings and other proceedings as O. P. Brant; that said name and designation was and is incorrect in that the true name of said party was O. F. Brant, or Otto F. Brant; that said Brant, however, appeared and pleaded in said District Court as O. P. Brant, without objection to said misnomer and without in any way calling the attention of court or plaintiff thereto; that petition for appeal with assignment of errors was filed and allowed, and præcipe and citation issued, served and filed in said District Court, on, to wit, March 10, 1922, whereby this court acquired jurisdiction of said appeal; that thereafter and during the pendency of said appeal, and on, to wit, March 14, 1922, said Brant departed this life, leaving a last will and testament which, on the 12th day of April, 1922, was admitted to probate in the Probate Court of the county of Los Angeles, California, and letters testamentary issued thereupon to Title Insurance & Trust Company, a corporation, of the State of California, as executor, the same being the executor named in said will; that said Title Insurance & Trust Company is now the duly qualified and acting executor of and under said will of Otto F. Brant, deceased, and is engaged in administering his estate.

II.

That the only person entitled under said will to any substantial interest in said estate as heir, devisee, or legatee is Susie E. T. Brant, of the county of Los Angeles, California, who is the widow of said Otto F. Brant, deceased; that the only other heirs of said Brant and the only other beneficiaries under said will are the six sons
48 and daughters of said decedent, to each of whom the sum of one ($1.00) dollar is bequeathed, and no other devise or bequest, whatever; that with the exception of said six nominal bequests of one ($1.00) dollar each, the entire estate, real and personal, of said decedent, is devised and bequeathed to his said widow and is now her property, subject to administration of said estate by said executor.

III.

That as appears from Paragraph IV of the complaint set forth in the transcript of record herein, said O. F. Brant or Otto F. Brant (erroneously therein described as O. P. Brant) in his lifetime claimed some right, title, interest or estate in and to the premises in said complaint described, the precise nature of which was and is unknown to plaintiff below and appellant here; that at the time of filing said complaint and up to the time of his death, said Brant, with others, was in actual possesion and control of said premises, although plaintiff and appellant did not and does not know, and could not and can not discover the facts whereon or whereby said possession and control are based or justified, if such there be; that by reason of the foregoing this appellant is unable to determine or state whether said interest, claimed and exercised by said Brant in his lifetime, was of the nature of realty or personalty; but that, under and by virtue of the statutes of the State of California, and of the terms of said will, said Title Insurance & Trust Company, as executor, and said Susie E. T. Brant as devisee and legatee of and under said will, are the only persons who have succeeded to and are entitled to hold and enjoy such right, title, interest, claim or demand in and to said premises as said Brant claimed, held or possessed in his lifetime.

Wherefore, appellant moves that an order be entered substituting said Title Insurance & Trust Company, as executor of the last will and testament of said Otto F. Brant, deceased, and said Susie
49 E. T. Brant, as parties appellee in this cause and court, in place and stead of said decedent; and providing that unless said substituted parties appear within sixty (60) days from the date of said order, said appellant shall be entitled to open the record, and on hearing have the judgment of said District Court, if erroneous, reversed, with the same effect, as against the heirs, executors, representatives and estate of said Brant, deceased, as if said trust company, as executor as aforesaid, and Susie E. T. Brant, had appeared as parties appellee herein; provided, however, that a copy of said order shall be personally served on each of said proposed parties at least thirty (30) days before the expiration of said sixty days.

JOSEPH C. BURKE,
United States Attorney.
GEORGE A. H. FRASER,
Special Assistant to the Attorney General.
Attorneys for Appellant.

[Jurat showing the above was duly sworn to by George A. H. Fraser, omitted in printing.]

[File endorsement omitted.]

50 **In U. S. Circuit Court of Appeals.**

Order substituting Title Insurance and Trust Company, a corporation, and Susie E. T. Brant in the place and stead of O. P. Brant, deceased, etc.

Filed May 15, 1922.

This cause coming on this day to be heard pursuant to notice, upon appellant's suggestion of the death of O. F. Brant (erroneously described as O. P. Brant) one of the appellees herein, and motion to bring in Title Insurance & Trust Company, as executor of the last will and testament of said O. F. Brant or Otto F. Brant, deceased, and Susie E. T. Brant, as appellees, in place and stead of said O. F. Brant (erroneously described as O. P. Brant), and the court being fully advised in the premises.

It is hereby ordered, that said Title Insurance & Trust Company, as executor, as aforesaid, and said Susie E. T. Brant, be, and they are hereby, substituted, as parties appellee herein, in the place and stead of said decedent; and that unless said substituted parties appear within sixty (60) days from the date of this order, appellant shall be entitled to open the record and, on hearing, have the judgment of the United States District Court for the Southern District of California, Northern Division, in this cause reversed, if erroneous, with the same effect as against the heirs, executors, representatives, and estate of said Brant, deceased, as if said trust company, as executor as aforesaid, and said Susie E. T. Brant had appeared as parties appellee herein.

Provided, however, that a copy of this order be personally served on said executor and said Susie E. T. Brant at least thirty (30) days before the expiration of such sixty days.

51 *Order filing certain opinions and recording certain decree and judgments.*

By direction of the Honorable William B. Gilbert, and Frank H. Rudkin, circuit judges, and the Honorable Frank S. Dietrich, district judge, before whom the causes were heard, ordered, that the typewritten opinion this day rendered by this court in each of the following entitled causes be forthwith filed by the Clerk and that a decree or judgment be filed and recorded in the Minutes of this court, in each of the causes in accordance with the opinion filed therein:

[Title omitted.]

52 In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Opinion.

Filed April 16, 1923.

GILBERT, *Circuit Judge:*

In the capacity of guardian of a band of mission Indians incompetent to manage their own affairs, known as the Tejon Indians, residing on a described tract of land in Kern County, California, the United States brought a suit against the appellees seeking to have the original title of occupancy and possession of the land by the Indians confirmed and established as a species of easement founded on the grant of title to the lands from the Mexican Government, and to obtain compensation for alleged acts of wrong and oppression committed by the appellees, and to enjoin further molestation of the Indians. The particular subject of the suit is
53 5,364 acres within the boundaries of El Tejon rancho consisting of 98,000 acres. The right of possession of the Indians is based upon allegations setting forth the following facts: From time immemorial the land has been continuously occupied by the Tejon Indians, who have resided thereon in permanent dwellings, have raised crops and cattle, and have remained under the spiritual charge of the Catholic Church. Under the laws of Spain and Mexico they were entitled to the undisturbed possession and use of the land they occupied, with the appurtenant water rights. Their right and title was protected by said laws until the land came under the jurisdiction of the United States. On May 30, 1843, two Mexicans petitioned the Mexican Government of California for the grant of the region known as El Tejon. On June 30, 1845, the grant was finally approved. The grant contained the condition that the grantees must not interfere with the cultivation and other advantages which the Indians, who were found established in said place, had always enjoyed. After the treaty of Guadalupe Hidalgo, the Mexican grantees petitioned the Board of Commissioners appointed under the act of Congress of March 3, 1851, to settle private land claims, for confirmation of the grant. On May 8, 1855, the grant was confirmed. The board in its opinion, referring to the condition expressed in the original grant said: "This restriction, we have heretofore decided does not affect the right of property, though it may create a use in
54 favor of the Indians living on the land at the time the grant was made, to the extent actually occupied by them. This, however, is a question cognizable before another tribunal." On successive appeals to the United States District Court and to the Supreme Court of the United States, the board's decision was affirmed. On May 9, 1863, a patent from the United States was issued conveying to said Mexican grantees the land, which includes the Indian

tract. The granting clause contained the following: "But with the stipulation that in virtue of the 15th section of the said act (March 3, 1851) the confirmation of this claim and this patent shall not affect the interests of third persons." By mesne conveyances, the title so granted passed to the appellees. A motion of the appellees to dismiss the complaint for want of equity was sustained and a final decree of dismissal was entered.

It is contended that the court below erred in holding that the case at bar is governed by the decision in Barker vs. Harvey, 181 U. S. 481. It is urged that the case is distinguishable from that case in that in the latter is was found as a fact that prior to the Mexican grant, the Indians who had dwelt within the confines thereof had abandoned their occupation, and the further fact that the grant, as finally allowed, contained no provision for their protection. Whereas, it is said in the case at bar the land has been continuously occupied and is still occupied by the Tejon Indians except as to parts thereof from which they have been wrongfully and forcibly
55 expelled by the appellees, and the Mexican grant as finally confirmed contains a provision for the protection of said Tejon Indians. We find that the decision in Barker vs. Harvey is explicitly grounded upon the fact that the Indians had failed to present to the Land Commission their claims of occupancy based upon the action of the Mexican Government. Said the court: "If these Indians had any claims founded on the action of the Mexican Government, they abandoned them by not presenting them to the commission for consideration." In so deciding, the Supreme Court answered the contention that the Indians were wards of the Government and were not chargeable with knowledge of the laws of the United States or the statute creating and defining the functions of the Land Commission, and were therefore not required to present their claims to that commission. It is no answer to the ruling in Barker vs. Harvey to say, as the appellant does, that the reasons set forth for the decision are dicta. We find them there advanced as the express ground on which the court's conclusion was reached. Nor do we find in the opinion anything to justify the distinction which is attempted to be made on the ground that in that case decision might have rested upon the fact that the Indians had before the date of the confirmation of their grants voluntarily abandoned their occupancy of the lands there in question. It is sufficient to say that the decision was not in fact based on that ground but upon grounds and reasoning which are applicable to the facts
56 alleged in the complaint in the present case, and if that reasoning is dictum it is for that court and not for this to say so. In fact, in one of the two cases there under consideration, the grant did contain words of protection of the Indian's rights. There is no escape from the conclusion that the presence of such words of protection affords no excuse for failing to present the claim to the Land Commission, for it is well established by a line of decisions of the

Supreme Court that any grant under the Mexican Government is lost and abandoned if not presented to the Land Commission. Botiller vs. Dominguez, 130 U. S. 238.

In brief, the decision in Barker vs. Harvey answers every contention now made by the appellant in the present case. It is a decision which is in harmony with, and in fact is foreshadowed by, prior decisions of the Supreme Court, such as Beard vs. Federy, 3 Wall. 478; Botiller vs. Dominguez, supra; Knight vs. U. S. Land Association, 142 U. S. 161; and Thompson vs. Los Angeles Farm and Milling Co., 180 U. S. 72.

The decree is affirmed.

[File endorsement omitted.]

57 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Decree.

Filed April 16, 1923.

Appeal from the District Court of the United States for the Southern District of California, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this case be, and hereby is, affirmed.

[File endorsement omitted.]

58 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Petition for appeal.

Filed May 15, 1923.

To the honorable judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the United States of America, appellant above named, and feeling itself aggrieved by the decision rendered and entered in this court in the above-entitled cause, on, to wit, the 16th day of April, A. D. 1923, does hereby crave an appeal from said decision to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that

its said appeal be allowed; that citation be issued as provided by law; and that a transcript of the record, proceedings, and documents upon which said decision was based, duly authenticated, be
59 transmitted to the Supreme Court of the United States, in accordance with the rules of said court in such case made and provided.

And in this behalf, appellant represents that the amount involved and the matter in controversy in said cause exceeds the sum of one thousand dollars ($1,000.00), besides costs, and that this is not a case wherein the jurisdiction of this court is made final.

JOSEPH C. BURKE,
United States Attorney,
Federal Building, Los Angeles, California,
GEORGE A. H. FRASER,
Special Assistant to the Attorney General,
230 Post Office Bldg., Denver, Colorado,
Attorneys for Appellant.

[File endorsement omitted.]

60 United States Circuit Court of Appeals for the Ninth Circuit.

Title omitted.

Assignment of errors.

Filed May 15, 1923.

Comes now the United States of America, appellant in the above entitled cause, and respectfully represents that in the record, proceedings and decree in said cause there is manifest error, in this, to wit:

1. That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree made and entered on, to wit, October 6, 1921, by the District Court of the United States for the Southern District of California.

61 2. That said Circuit Court of Appeals erred in not reversing the judgment and decree of said District Court, by reason of the error of said District Court in sustaining the motion to dismiss the bill of complaint interposed by defendants in said cause.

3. That said Circuit Court of Appeals erred in holding that said case is governed by the decision of the Supreme Court of the United States in Barker vs. Harvey (181 U. S. 481).

4. That said Circuit Court of Appeals erred in failing to distinguish the decision in said Barker vs. Harvey, for the reason that in said case the claim and title of the Indians there concerned was presented as though founded upon the action of the Government of Mexico, and as though derived from the Government of Spain or Mexico; whereas, in the case at bar the claim or right of the Indians on whose behalf this suit is prosecuted, was not based upon any action of the Government of Mexico, nor is it derived from the Government of Spain or of Mexico, although recognized and acknowledged by both of said Governments.

5. That said Circuit Court of Appeals erred in holding in effect that by said decision in Barker vs. Harvey the Supreme Court held that Indian wards of the United States were chargeable with knowledge of the laws of the United States, and especially with knowledge of the act of Congress of March 3, 1851 (9 Stat. L. 631).

6. That said Circuit Court of Appeals erred in holding that the decision in said Barker vs. Harvey was not in fact based on the ground of the abandonment of their possession by the Indians there concerned, but on legal principles and reasoning directly applicable to the case at bar.

7. That said Circuit Court of Appeals erred in holding that said decision in Barker vs. Harvey is applicable to and answers every contention made by appellant herein.

8. That said Circuit Court of Appeals erred in holding in effect that the bill of complaint herein does not state any matter
62 of equity entitling plaintiff to the relief prayed for or any relief, and in holding in effect that the facts stated in said bill are not sufficient to entitle plaintiff to the relief prayed for or to any relief against defendants or any of them.

9. That said Circuit Court of Appeals erred in holding in effect that the Tejon Indians, on whose behalf this suit is prosecuted, abandoned and lost all and singular their claims, rights, titles, and interests of occupancy and possession described in said complaint, by failure to present the same to the commission appointed under and by virtue of the act of Congress of March 3, 1851 (9 Stat. L–631), to adjust land claims in California.

10. That said Circuit Court of Appeals erred in holding in effect that the patent issued by the United States to the predecessors of the defendants named in the complaint herein and covering the land in said complaint described, is conclusive of the title of defendants, and that under and by virtue of said patent said title is free from, clear of, and not subject to any claim, right, title or interest of the Tejon Indians set forth in said bill of complaint.

11. That the said Circuit Court of Appeals erred in holding in effect that said Tejon Indians are not and were not "third parties" whose rights under said act of March 3, 1851, remained and still remaining unaffected by the issuance of said United States patent to defendants' predecessors.

12. That said Circuit Court of Appeals erred in holding in effect that defendants' title was not and is not now charged with and subject to the Indian right, title and interest of occupancy, use and possession described in the complaint herein.

13. That said Circuit Court of Appeals erred in holding that said act of March 3, 1851, required said Tejon Indians to appear before the Board of Commissioners created by said act, there to
63 set up and maintain said title of occupancy and possession or for any purpose or at all.

14. That said Circuit Court of Appeals erred in holding in effect that land charged with and subject to said Indian title is not

and can not properly be known as " public domain " or " public land of the United States."

15. That said Circuit Court of Appeals erred in holding in effect that the act of the State of California of April 22, 1850, later adopted by Congress as a safeguard for said Tejon Indians and other Indians by the act of January 12, 1891 (26 Stat. L., p. 712, sec. 6), did not and does not protect said Tejon Indians, and did not and does not affect the property described in the complaint with an easement or a trust in favor of said Indians prior and superior to any title or titles of defendants and constituting a right of use, occupancy and possession superior to any title or titles of defendants.

16. That said Circuit Court of Appeals erred in holding in effect that the object of said act of 1851 was not fully served when the Mexican grantees mentioned in the complaint herein presented their title for confirmation, without presentation by said Indians of their said title.

17. The said Circuit Court of Appeals erred in holding that said Tejon Indians, being wards of the United States and non sui juris, were charged with knowledge of said act of March 3, 1851, or any of its provisions or requirements, and that it was the intention of Congress to make said act applicable to such Indians or to bind them by any of its provisions.

18. That said Circuit Court of Appeals erred in holding that the case at bar is governed by the decision in said Barker vs. Harvey and that it is not distinguishable in fact therefrom, especially in that, in Barker vs. Harvey it was found as a fact that prior to the Mexican grant the Indians there concerned had abandoned their occupancy, and that the grant as finally allowed contained no recognition
64 of their right or title; whereas in the case at bar, the land in controversy has been continuously occupied and is still occupied by said Tejon Indians, except as to parts thereof from which they have been wrongfully and forcibly expelled by defendants, and the Mexican grant as finally confirmed contains a specific acknowledgment of the right and title of said Indians.

19. That said Circuit Court of Appeals erred in holding in effect that the United States patent issued to defendants' predecessors as described in the complaint charged or enlarged the rights of grantees therein by relieving or discharging said rights of or from the easement, trust or use of occupancy and possession of the Tejon Indians of a portion of the land conveyed by said patent and described in the complaint.

Wherefore, appellant prays that this appeal be sustained; that said decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and that said court be directed to enter a

decision reversing the judgment and decree of the United States District Court for the Southern District of California in said cause.

JOSEPH C. BURKE,
United States Attorney,
Federal Building, Los Angeles, California.
GEORGE A. H. FRASER,
Special Assistant to the Attorney General,
230 Post Office Bldg., Denver, Colorado.
Attorneys for Appellant.

[File endorsement omitted.]

65 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Order allowing appeal.

Filed May 15, 1923.

This case coming on this day to be heard upon the petition of appellant herein, for the allowance of an appeal from this court to the Supreme Court of the United States, from the decision heretofore filed and entered herein, on to wit, April 16, A. D. 1923, affirming a decree of the United States District Court for the Southern District of California, in this case.

It is hereby ordered that an appeal from this court to the Supreme Court of the United States, from said decision, be, and the same is hereby, allowed; that a certified transcript of the record of proceedings herein be forthwith transmitted to the said Supreme Court of the United States, and that no bond be required from appellant herein.

Given at San Francisco, California, this 15th day of May, A. D. 1923.

WM. B. GILBERT,
United States Circuit Judge.

[File endorsement omitted.]

66 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Certificate of Clerk, U. S. Circuit Court of Appeals, to transcript of record on appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-five (65) pages, numbered from and including 1 to and including 65, to be a full, true, and correct copy of the record under

rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled cause, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 22d day of May, A. D. 1923.

[SEAL.] F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Deputy Clerk.

67 [Title omitted.]

Citation.

Filed May 19, 1923.

[Omitted in printing.]

68 Service of a copy of the above citation at Los Angeles, California, this 17 day of May, A. D. 1923, is hereby accepted and acknowledged.

O'MELVENY, MILLIKIN, TULLER & MACNIEL,
WALTER K. TULLER,
Attorneys for Appellees.

[File endorsement omitted.]

(Indorsed on cover:) File No. 29668. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 358. The United States of America, appellant, vs. Title Insurance & Trust Company, Security Trust & Savings Bank, Harry Chandler, et al., etc. Filed June 6th, 1923. File No. 29668.

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